

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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: 19cv1862 (DLC)
JOSE JAVIER FERNANDEZ, ELVIO TORIBIO, :
and ARIEL OVALLES, : ORDER
:
Plaintiffs, :
-v- :
:
THE CITY OF NEW YORK, NEW YORK CITY :
POLICE DEPARTMENT, JAMES P. O'NEILL, :
Commissioner of the New York City :
Police Department, POLICE OFFICER :
JOSE CEPEDA, Shield #19206, SGT. :
AMADEO OKTROVA, Shield #26126, and :
NEW YORK CITY POLICE OFFICERS JOHN :
DOES (names and shield numbers of whom :
are presently unknown) and other :
unidentified members of THE NEW YORK :
CITY POLICE DPEARMENT, :
Defendants. :
:
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DENISE COTE, District Judge:

Plaintiffs Ariel Ovalles and Elvio Toribio failed to appear for their originally scheduled depositions, in November 2019 and January 2020, respectively. By Orders of January 14 and January 28, Ovalles and Toribio were ordered to appear for rescheduled depositions. These Orders included the warning that failure to appear for the depositions might result in dismissal of their claims. On March 6, 2020, defendants moved to dismiss the claims of Ovalles and Toribio, asserting that they had failed to appear as ordered. An Order of March 6 made any opposition to

defendants' motion due March 13. Plaintiff's counsel has filed no opposition.

"In imposing Rule 37 sanctions . . . courts properly consider various factors, including (1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of noncompliance." Funk v. Belneftekhim, 861 F.3d 354, 366 (2d Cir. 2017) (citation omitted). Here, Toribio and Ovalles have offered no explanation for their noncompliance. As even the threat of dismissal was insufficient to produce compliance, there is no reason to believe that lesser sanctions would have been effective. Ovalles and Toribio have failed to participate in scheduled discovery since at least January and been non-compliant with court orders since at least February. They were warned that noncompliance could result in dismissal of their claims. All four factors support the sanction of dismissal. Accordingly, it is hereby

ORDERED that the claims of Ariel Ovalles and Elvio Toribio are dismissed.

Dated: New York, New York
March 17, 2020



DENISE COTE
United States District Judge